Ak-Sar-Ben Roofing Company, Inc. and United Union of Roofers, Waterproofers and Allied Workers, Local Union No. 85. Case 17-CA-11200

#### 15 March 1984

## **DECISION AND ORDER**

# By Members Zimmerman, Hunter, and Dennis

On 26 August 1983 Administrative Law Judge Hubert E. Lott issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions<sup>1</sup> and to adopt the recommended Order.

#### **ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Ak-Sar-Ben Roofing Company, Inc., Omaha, Nebraska, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except the attached notice is substituted for that of the administrative law judge.

# **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to furnish the United Union of Roofers, Waterproofers and Allied Workers, Local Union No. 85, with wage and other financial information set forth and contained in the Union's letter dated 17 August 1982.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed to you by Section 7 of the Act.

WE WILL furnish the above-named labor organization with the wage and other financial information it has requested in its letter of 17 August 1982.

AK-SAR-BEN ROOFING COMPANY, INC.

#### DECISION

#### STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge. This case was tried at Omaha, Nebraska, on March 24, 1983, on an unfair labor practice charge filed on September 16, 1982, by United Union of Roofers, Waterproofers and Allied Workers, Local Union No. 85 (herein called the Union) against Ak-Sar-Ben Roofing Company, Inc. (herein called the Respondent) and on a complaint issued by the General Counsel on November 4.

The issue in this case is whether or not Respondent violated Section 8(a)(1) and (5) of the Act when it refused, on request, to furnish employee wage information to the Union.

The parties were afforded the opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of hearing briefs have been received from the parties in this case.

On the entire record and based on my observation of the witnesses and in consideration of the briefs submitted, I make the following

## FINDINGS OF FACT

#### I. JURISDICTION

Respondent is a Nebraska corporation engaged as a roofing contractor in the building and construction industry at its facility in Omaha, Nebraska. It annually, in the course and conduct of its business, purchases goods and services in excess of \$50,000 which it receives directly from points outside the State of Nebraska. Respondent admits, and I find, that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

# II. THE ALLEGED UNFAIR LABOR PRACTICES

The relevant facts are not in dispute. Therefore, no credibility issues were involved in this case.

At all times material, Respondent, which is a member of the Omaha-Council Bluffs Roofing Contractors Association, Inc., has had a collective-bargaining relationship with the Union. This relationship has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms for the period of June 1, 1981, to May 31, 1983.

<sup>&</sup>lt;sup>1</sup> The Respondent contends that the conduct of the judge in this proceeding demonstrated bias and prejudice so as to deprive the Company of its right to a fair and impartial hearing of the issue; that the judge should therefore be disqualified; and that the case should be remanded for a hearing de novo. Upon a careful examination of the judge's decision and the entire record, we are satisfied that the contentions of the Respondent in this regard are without merit. We therefore deny the Respondent's motion to disqualify the judge.

<sup>&</sup>lt;sup>1</sup> All dates refer to 1982 unless otherwise indicated.

By virtue of these collective-bargaining agreements, the Union represents:

All full-time and regular part-time journeymen roofers, apprentices and helpers employed by the employer-members of the association, including Respondent, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Some of Respondent's unit employees who are represented by the Union are performing work on the State Penitentiary in Lincoln, Nebraska (Lancaster County). In July, business agent Larry Thiesen received complaints from employee-members that they were not being paid the contract rate on the Lincoln Penitentiary job. On August 17, Thiesen, relying on certain contract provisions set forth below, requested permission to examine payroll records dealing with wages, transportation, traveling time, expense accounts, and fringe benefits, because employees were not being paid in accordance with the provisions of the contract.

The contract provisions relied on by Thiesen are:

## ARTICLE VII-Travel Time

Each man is to get to the job, provided it is in the "free zone," at his own expense and by his own method of transportation. His time will start at the time he starts to work, whether it is the regular starting time or later.

The "free zone" for the purposes of this agreement is defined as any point lined on or within fifty-five (55) miles on an all weather road, including the city of Lincoln, not its suburbs, using the Omaha main post office at Sixteen (16) and Capitol Streets as a starting point.

In the event men are moved from one job to another during the working day, transportation, if any, and travel time will be paid.

. . . Contractors may hire outside of the free zone at the prevailing rates in the area outside said free zone.

# ARTICLE VIII—Wages

When workmen are sent by the first party to supervise or perform work outside the geographical limitations provided for in this agreement and outside the geographical jurisdiction of the union and said work is to be performed within the geographical jurisdiction of any other sister local union in whose jurisdiction the work is being performed, unless said hourly rate is less than the prevailing rate provided for in this agreement shall be paid.<sup>2</sup>

#### ARTICLE XIII—Records

This provision requires the employer to submit his books and records for examination by the Union to insure the contract is being adhered to. The information submitted shall include payroll records, transportation and traveling time records, expense accounts and fringe benefits.

ARTICLE XVII—Pension Plan/Health and Welfare Benefits

This provision deals with the employer's contribution in various benefit plans.

## ARTICLE XVIII—Helpers

This provision sets forth the wage rates of helpers.

On August 23, Respondent wrote to the Union requesting additional information as to the jobsite location of the alleged violations and the specific basis for the Union's inquiry.

On August 25, the Union sent a letter to Respondent which stated that it had check stubs of employees on the Lincoln Nebraska Penitentiary job which clearly showed that the employees were not being paid in accordance with the contract.

In a letter dated September 8, Respondent refused the Union permission to examine its records because it claimed Lincoln, Nebraska (Lancaster County) was outside the territorial jurisdiction of the Union.

Respondent defends its refusal to furnish information by claiming that Lincoln, Nebraska (Lancaster County), is outside the territorial jurisdiction of the Union as indicated in the back portion of the contract booklet where the counties under the Union's jurisdiction are listed. Lancaster County is not listed among those counties. Respondent's witness admitted that the original contract signed by the parties did not contain any listing of counties. Union witness Thiesen testified that after the original contract was signed but before it was printed in booklet form, he added the counties assigned to his Union for union purposes only.

Respondent's witness John Shea also testified that, during the 1981 negotiations, the Union proposed changing the "free zone" to include all of the territorial jurisdiction of the Union. He also testified that, during the 1982 negotiations, the Union proposed changing the hiring procedures to allow the Union to furnish employees before the employer hired at the jobsite. These proposals were rejected by Respondent and never included in the contract.

### III. ANALYSIS AND CONCLUSIONS

Respondent offered evidence and argued in brief that since the Union's territorial jurisdiction did not extent to Lincoln, Nebraska, Respondent had no obligation to furnish the Union with the requested information because it is not relevant. Counsel further argued that the contract does not apply to Lincoln, Nebraska, and its terms and

<sup>&</sup>lt;sup>2</sup> This provision is somewhat confusing but was clarified by the testimony of Respondent's witness John Shea who stated that, when employees are hired for work outside the Union's territorial jurisdiction, they are paid either the prevailing wage scale or the contract wage scale, whichever is higher. In this case, Respondent paid the contract rate because it is higher than the prevailing rate.

conditions apparently are not applicable to its employees who are represented by the Union.

Respondent's evidence and argument in brief seems clearly directed at restricting the Union's representation of employees to the Union's territorial jurisdiction. On the facts alone, Respondent cannot prevail. The territorial jurisdiction of the Union enumerated in the back of the contract booklet is clearly not a part of the contract and, if anything, is an intra-union matter having no contractual significance. Moreover, at least two contract provisions—the free zone provisions under travel time and the wage provision—clearly contemplate that the contract shall be in effect outside the Union's territorial jurisdiction. This, however, is really not the issue and in some respects is probably irrelevant to the case at hand. However, Respondent was allowed to introduce evidence on this issue since it was Respondent's only defense. The central issue in this case is whether or not the Union's territorial jurisdiction has any effect on employee rights to representation. By long established practice, the Board does not accord the Union's territorial jurisdiction any weight in determining the representation rights of employees. Utilities Corp., 254 NLRB 480 (1981). Respondent in this case appears to be assuming the position of an arbitrator in deciding that the contract is not binding on it and further deciding that, since it is not binding, its employees have no representation rights. The former action is contractually indefensible and the latter action is illegal.

It hardly need be said that the wage and other financial information requested by the union is relevant under the circumstances of this case. Accordingly, it is not only incumbent on Respondent to furnish it under the terms of the contract but is also necessary for Respondent to furnish it under the terms of the Act. Brazos Electric Power Cooperative, 241 NLRB 1016 (1979); Brookland Union Gas Co., 220 NLRB 189 (1975); General Electric Co., 199 NLRB 286 (1972).

Accordingly, I find that, by refusing to allow the Union to examine wage and other financial information relating to the unit employees benefits and working conditions, Respondent has violated Section 8(a)(1) and (5) of the Act.

## CONCLUSIONS OF LAW

- 1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. All full-time and regular part-time journeyman roofers, apprentices and helpers employed by the employermembers of the association, including Respondent, but excluding all office clerical employees, professional employees, guards and supervisors defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.
- 4. Respondent has violated Section 8(a)(1) and (5) of the Act by refusing to furnish the Union with wage and

other financial data set forth and requested in the Union's letter dated August 17, 1982.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take affirmative action necessary to effectuate the purposes of the Act and to post appropriate notices. I shall further recommend that Respondent furnish the Union with the requested financial information or that it permit the Union to examine the records containing this information.

Based on the foregoing findings of fact and conclusions of law and the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

The Respondent, Ak-Sar-Ben Roofing Company, Inc., Omaha, Nebraska, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Refusing, on request, to furnish relevant wage and benefit information to the Union so that it may administer the terms and conditions of the collective bargaining agreement.
- (b) In any like or related manner restrain or coerce its employees in the exercise of the rights guaranteed in Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Furnish United Union of Roofers, Waterproofers and Allied Workers, Local Union No. 85, with the wage and other financial information it has requested in its letter of August 17, 1982.
- (b) Post at its facility in Omaha, Nebraska, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.
- (c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>&</sup>lt;sup>9</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>&</sup>lt;sup>4</sup> If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."